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SUMMARY RECORD OF THE 20th MEETING

Chairman:	Mrs. FLORES	(Uruguay)
later:	Mr. AL-SUWAIDI (Vice-Chairman)	(United Arab Emirates)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (continued) (A/48/10; A/48/303 and A/48/170-S/25801)

1. Mr. SEYDOU (Niger) said that the excellent report of the International Law Commission on the work of its forty-fifth session (A/48/10) followed a well-established tradition: the lengthy report reflected the Commission's thorough and serious consideration of a set of complex and important topics.

2. He congratulated the Chairman of the Working Group on a draft statute for an international criminal court and the Special Rapporteur on the draft Code of Crimes. With exemplary speed, the Special Rapporteur had prepared and submitted to the Commission a set of articles relating to a draft statute for an international criminal court, as requested by the General Assembly in its resolution 47/33. That concise and comprehensive text was clearly the work of an eminent jurist. His delegation shared the Commission's view that the court's jurisdiction should be limited to individuals and that it should not be authorized to try international organizations or States.

3. Turning to the draft statute, he drew attention to the three alternatives provided under article 23 relating to acceptance by States of jurisdiction over crimes listed in article 22. His delegation preferred alternative B, as it would be undesirable for a State, once it had accepted the court's jurisdiction, to hinder its functioning by then excluding a number of crimes from that jurisdiction. Alternative B would thus ensure that States parties acted in a more stable manner; it would also enable the court to exercise broad jurisdiction, whereas the "opting in" system proposed under alternative A would in the long run sap the vitality of the court and transform it into a body with very limited jurisdiction.

4. His delegation was in favour of article 25, which would confer on the Security Council the power to refer cases to the court, for two reasons: first, the court, whose establishment had been requested by the General Assembly, ought to be a legal organ of the United Nations; and secondly, many of the crimes listed under article 22 were associated in some way with international peace and security. His delegation shared the view that the power to refer cases to the court under article 25 should also be granted to the General Assembly in the event that the Security Council was blocked by a veto.

5. With regard to article 22, he considered that the term "grave breaches" in paragraph (b) should be clarified: what degree of gravity had to be reached for a matter to fall within the jurisdiction of the court?

6. As to the procedure for referring cases to the court, he emphasized that during its consideration of the draft statute at its next session, the Commission should ensure that justice was administered properly, in view of the economic concerns of some of its members.

7. The draft articles represented a solid basis for the Commission's future work, and it was to be hoped that the Commission would do everything possible to submit a final text to the General Assembly at its forty-ninth session.

(Mr. Seydou, Niger)

8. Regarding the law of the non-navigational uses of international watercourses, he applauded the progress made by the Commission thus far, in particular the elaboration of a set of draft articles, the final form of which should be a framework convention. The diversity of problems facing watercourse States was such that it would be very difficult to elaborate a general convention specifying the rights and duties of those States in detail. The draft articles should include dispute settlement clauses. The variety of types of watercourses should not prevent the Commission from elaborating specific rules in that area.

9. As a depositary of the 1981 agreements relating to the Niger Basin Authority, his country was strongly in favour of an integrated approach to the development, management and use of water resources. That idea was reflected in paragraph 18.8 of Agenda 21, which stated that water was an integral part of the ecosystem and constituted a natural resource and a social and economic good whose quality and quantity determined its use.

10. His delegation shared the view expressed in paragraph 369 of the Commission's report that it was best to treat the topics of international watercourses and the law of confined groundwaters separately, similar to the way in which the Commission had dealt with the law of treaties in regard to State succession.

11. The Commission should strive to complete its consideration of the draft articles relating to the law of the non-navigational uses of international watercourses at its next session. While not wishing to comment specifically on the draft articles, in accordance with the request of the Chairman of the Commission, he wished to emphasize that the principle of reasonable and equitable utilization was the cornerstone of those articles.

12. His delegation supported the Commission's proposal to include in its programme of work the topics "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons". In addition, having benefited in the past from the fruitful exchange of views between the members of the Commission and the participants in the International Law Seminar, he wished to thank those States whose financial contributions had helped make the twenty-ninth Seminar possible. He called upon other States to ensure the smooth operation of the thirtieth Seminar.

13. He congratulated the Office of Legal Affairs on its fine work, including its efforts to speed up the publication of documents essential to the work of lawyers and to the progressive development of the law.

14. Mr. MIKULKA (Czech Republic) said that the draft statute for an international criminal court, prepared in response to an urgent appeal from the General Assembly in its resolution 47/33, was the most important achievement of the Commission's forty-fifth session, and proved that, with a clear mandate from the General Assembly, the Commission was able to accomplish, in a relatively short period of time, difficult and complex tasks.

15. While the question of an international criminal court had been raised periodically since the end of the Second World War, the drafts elaborated in

(Mr. Mikulka, Czech Republic)

various international forums had never been followed up with concrete political measures. That state of affairs had only served to convince sceptics who claimed that the Nuremberg and Tokyo Tribunals had been merely the outcome of a momentary set of circumstances which could never be reproduced.

16. It was unfortunate that a renewal of interest in an international criminal court had had to be inspired by the tragic events in the former Yugoslavia, which had reawakened humanity's conscience and had confirmed once again that individual criminal responsibility for war crimes and crimes against humanity did not belong only to the past. The international community had had to resort to an ad hoc tribunal to try the authors of war crimes committed in the former Yugoslavia. It was time to move towards the establishment of a permanent and universal jurisdiction for the purpose of punishing abominable crimes that might go unpunished under domestic law. To that end, the Commission's draft statute for an international criminal tribunal provided a solid starting-point.

17. Special mention should be made of the excellent work done by the Special Rapporteur and by the Working Group on a draft statute for an international criminal court. Their efforts to find reasonable solutions to the various difficult problems involved would contribute greatly to the widest possible acceptance by States of the set of draft articles. The draft statute was no longer the modest mechanism envisaged a year earlier by the Commission. With the Sixth Committee's encouragement, the Commission had transformed the draft into an ambitious, but still flexible project, which reflected the recent changes in political attitudes.

18. His delegation shared the view that, in the light of the court's proposed jurisdiction ratione materiae and its permanent character, the most appropriate form for the statute would be a multilateral convention. The fact that the court would be established on that basis would not in any way exclude the possibility that ad hoc courts could be established by a decision of the Security Council, when the appropriate conditions for doing so existed. Resort to ad hoc courts would always be a possibility, since it was unlikely that all States would become parties to the statute of a permanent court.

19. His delegation favoured the second variant proposed under article 2 of the draft statute, namely that the tribunal should be linked with the United Nations. The alternative - becoming a judicial organ of the Organization - would necessarily give rise to the difficult question of an amendment to the Charter.

20. The close link between the United Nations and the court reflected its universal character. That same feature should naturally lead to the choice of judges being based on the principle of geographical equity: the tribunal would gain nothing by excluding any particular regional group, as had unfortunately been the case with the ad hoc tribunal for the former Yugoslavia.

21. One of the most important issues, the solution to which would largely determine the court's prospects, was that of its jurisdiction ratione materiae. Under article 22 of the draft statute in accordance with the approach chosen by the Commission in 1992, that jurisdiction would extend to crimes defined under the international conventions currently in force. Article 22 covered a wide

(Mr. Mikulka, Czech Republic)

range of crimes, and the urgency of bringing their authors to trial before an international court varied considerably. Furthermore, the fact that a crime was defined under a convention was not sufficient for deciding which international crimes committed by individuals should fall within the court's jurisdiction. In his delegation's view, the court's jurisdiction should be limited to the most serious crimes, those which most deeply offended the conscience of the international community.

22. The explicit reference in article 22 to particular conventions should not obscure the basic fact that the crimes referred to in that article were punishable regardless of whether the States concerned had ratified the convention in question. That was particularly important in the light of the provisions of article 25, which dealt with cases referred to the court by the Security Council.

23. In respect of article 23, his delegation preferred alternative B, although the choice between the "opting in" and "opting out" systems did not, in principle, represent a substantial difference in a State's attitude towards the court's jurisdiction. Under either alternative, a State could express freely and without restriction its desire to accept or reject the jurisdiction of the court for crimes which otherwise would fall within its own jurisdiction. The three alternatives proposed under article 23 in fact enabled a State to become a party to the statute without accepting the jurisdiction of the court in respect of at least one category of crimes. That did not actually correspond to the desired goal in establishing an international criminal court; however, it was justified by the fact that, even without accepting the jurisdiction of the court, a State party to the statute would accept certain obligations.

24. Article 24 provided an acceptable solution to the problem of which States had to consent in order to establish the jurisdiction of the court. Most of the conventions listed under article 22 were based on the principle of universal jurisdiction. It was therefore logical that the sole criterion needed to establish the court's jurisdiction in respect of a particular crime referred to in article 22 was that its jurisdiction should be accepted by a State which, under the relevant treaty, was authorized to try the suspect before its own courts. Requiring the consent of more than one State to establish the court's jurisdiction would considerably limit its role, without justification. Furthermore, his delegation welcomed the language of paragraph 1 (b) of article 24, which, in making explicit reference to the Convention on the Prevention and Punishment of the Crime of Genocide, should dispel any doubts raised by the preceding subparagraph.

25. As a permanent body, the international criminal court should, so far as possible, replace ad hoc tribunals. Article 25 of the draft statute was welcome in that connection since it enlarged the jurisdiction of the court to include cases referred to it by the Security Council. Nevertheless, it should be made explicit that such cases must be limited to those representing a threat to international peace and security. The Security Council should not be given unlimited authority to refer cases to the court without the consent of States.

(Mr. Mikulka, Czech Republic)

26. It would be hard to justify excluding from the court's jurisdiction crimes under general international law that were not covered under article 22, in particular crimes directly linked to an act of aggression; such an exclusion would be a step backwards for positive international law. He therefore welcomed paragraph 2 (a) of article 26, under which a State could by special consent accept the court's jurisdiction over crimes under general international law not covered by article 22. In that connection, the Commission should spell out the modalities of such special consent, as it had done in article 23.

27. Article 27 dealt with the delicate question of the relationship between the Security Council and the proposed international criminal court. His delegation interpreted that article as a procedural provision which was without prejudice to substantive law. Under article 27, a person could not be charged with a crime of or directly related to an act of aggression unless the Security Council had first determined that such an act had actually taken place. While far from ideal, that was the most realistic solution in view of current conditions.

28. Article 28 resolved the issue of applicable law in a satisfactory manner. The statute, applicable treaties and the rules and principles of general international law should serve as the principal sources of law for the court. Applicable law thus embraced the rules of treaty law and the rules of customary law. The application of the principle nullum crimen sine lege required that the rules of customary law must be applied so that no difficulty arose from the fact that some States, but not all, had acceded to a particular convention. At the same time, the codification of substantive law, at least with regard to crimes falling within the court's jurisdiction, must advance in step with the elaboration of the statute and the rules of procedure.

29. In contrast to international customary or treaty law, national law was by definition limited as a source of applicable law; that fact was reflected in the wording of paragraph (c) of article 28, which referred to "any applicable rule of national law". When there was a contradiction between national and international law, the latter should prevail without question. Moreover, defining an act or failure to act as a crime with regard to international law must be independent of national law. That certainly did not mean that national law was irrelevant: all States had a common pool of law in regard to both the protection of fundamental rights and criminal procedure. Thus, although international law provided an adequate basis for the exercise of jurisdiction ratione materiae, related questions, including standard penalties, required resort to national practice.

30. It was realistic to limit the right to bring complaints to States which had accepted the jurisdiction of the court with regard to the crime in question, and to the Security Council, as provided in article 29. A more liberal system might dissuade some States from accepting the court's jurisdiction out of fear that the jurisdiction might be abusively invoked by other States that had not themselves accepted it.

31. His delegation believed that, as recommended in the Commission's report, written observations on the other provisions of the statute would be appropriate.

32. Mr. KOTZEV (Bulgaria) said that Bulgaria had always supported the proposal for the establishment of an efficient international criminal mechanism with jurisdiction over the most serious violations of international law. He now wished to make some comments on issues which remained unresolved and needed further elucidation, especially those on which the Commission was seeking some guidance from the General Assembly for its future work.

33. Article 2 of the draft statute for an international criminal tribunal dealt with the important issue of the place of the international criminal court in the United Nations system. He understood that in drafting the provision, the Commission had proceeded on the presumption that such a court should be part of the United Nations system. That would raise serious problems, both in terms of competencies and in terms of the functioning of the court. If it was to be part of the United Nations system, what kind of United Nations body would it be? If it was to be another principal organ, an amendment to the Charter would be necessary, and the problem of the relationship between the International Court of Justice and the new court would arise. If it was to be envisaged as a subsidiary body, the question arose as to whether it would be a subsidiary body of the General Assembly or of the Security Council.

34. His delegation felt that a more pragmatic approach would be for the court to be established under the auspices of the United Nations by the conclusion of a multilateral treaty. The relationship between the court and the United Nations could be established either by a separate agreement or by specific provisions to be added to the draft under discussion. His delegation also considered that the court should be a permanent institution, although not sitting on a full-time basis. He was a bit hesitant about the term "tribunal" used in article 5 of the draft statute. It should be noted that the tribunal itself would consist of different bodies, namely, the court, the registry and the procuracy, which were supposed to be separate and impartial. The office of the Procuracy should be absolutely independent and protected from any form of pressure or intimidation. In order not to undermine the credibility of such an international judicial system, he suggested that the International Law Commission, at its next session, should consider other ways of qualifying the system. In his view, it was not a purely semantic problem, but had to do with the substantive issue of the functioning and competence of the court, the registry and the procuracy.

35. Turning to part 2 of the draft, dealing with jurisdiction and applicable law, he said his delegation was of the view that it was best for the jurisdiction of the international criminal court to be compulsory for all States Members of the United Nations, or at least for the States parties to the statute of the court. That was the reason for his delegation's support for alternative B of article 23. As to the question of the applicable law and the subject-matter jurisdiction of the court, his delegation shared the view that it should be based on well-defined and generally accepted norms of international law. At the present juncture, the most appropriate international instrument to establish a proper substantive legal basis for the efficient functioning of the court was the Code of Crimes against the Peace and Security of Mankind. The International Law Commission should expedite its work on that topic, and precisely define different categories of the most serious crimes. In that way,

(Mr. Kotzev, Bulgaria)

the principle of nullum crimen sine lege would be observed. Also, domestic laws of States should not serve even indirectly as a basis for subject-matter jurisdiction. For the principle of equality to be guaranteed during the trial, it was essential that the respective penalties should be defined accurately and clearly in the Code, because otherwise the principle of nulla poena sine lege would not be observed. His delegation felt that the question needed further consideration in the Commission.

36. With regard to part 3, on the investigation and the commencement of prosecution, his delegation found the provisions contained in the draft satisfactory. However, the Commission should explore the possibility of providing for the States concerned to be entitled to their own national judges in the chamber which would hear the case.

37. Parts 4 and 5 of the draft were based on the fundamental principles of criminal law, namely, the principles of legality, equality before the court, the administration of a fair trial, and the protection of the rights of the accused. His delegation was in general agreement with the provisions regarding international cooperation and judicial assistance. It also agreed with the suggested draft articles on the appeal and review against judgement and sentences. As far as the financial aspects of the establishment of the court were concerned, his delegation believed that in view of the universal importance of the functions which the court was supposed to perform, its financing should be provided by the United Nations, regardless of whether it would be established by the conclusion of an international treaty or in any other way. Issues related to financial assistance and budgetary matters should be included in the draft statute.

38. His delegation hoped that the Commission would be willing and able to conclude its work on the draft statute of the international criminal court at its next session, especially if provided with pertinent information on the activities of the ad hoc tribunal concerning the former Yugoslavia. He also wished to suggest that an informal group should be set up in order to summarize the views expressed in the Sixth Committee and give concrete guidance to the Commission on its pending problems.

39. Mr. HLAVACEK (Slovakia) said that the first fundamental question which had drawn the attention of his delegation was that of whether the international criminal court should be a judicial organ of the United Nations, or whether it should operate as a separate entity while maintaining some kind of ties to the Organization. If the court was considered a principal organ of the United Nations, the Charter would have to be amended accordingly. Incorporation of the court within the system of principal United Nations organs would give rise to other problems as well. For example, it would not be clear whether the statute would be an integral part of the Charter of the United Nations; if it was, further problems would arise in connection with its amendment, as foreseen in article 21 of the draft statute. Such an amendment would only be possible through a conference convened to revise the Charter. If the court was not considered one of the principal organs of the United Nations, but a subsidiary body of one of the principal organs, other problems would emerge. The problems of amending the Charter would be eliminated, but the problem of the adequate legal framework for the establishment and operation of the permanent

(Mr. Hlavacek, Slovakia)

judicial tribunal would arise. The Security Council was empowered to establish a tribunal only when acting under Chapter VII of the Charter, in cases of actual threats to peace, breaches of peace and acts of aggression. Such action could be undertaken by the Security Council only when the situation warranted it, but not as a preventive measure. Should the court operate as a subsidiary organ of the General Assembly, the question of an adequate legal framework would become even more serious, given the nature of the General Assembly's resolutions. For all the above reasons, his delegation was in favour of establishing the international criminal court by a multilateral convention. At the same time, it was of the opinion that the court should cooperate as closely as possible with the United Nations under an appropriate agreement, and thus become a part of the United Nations system.

40. Concerning the structure of the tribunal and the procedure for the election of judges, the registrar and the prosecutor, he found the proposal of the Working Group acceptable in principle. Nevertheless, in the light of recent experience, his delegation would be glad to see in article 7 some guarantees for equitable geographical representation in the court. His delegation was not fully convinced that the special nature of an international criminal institution justified the non-re-election principle as embodied in article 7 (6). There were no fundamental differences between the judicial position of judges of the International Court of Justice, of some international courts in the field of human rights and of the proposed international criminal court. For the same reason, a 9-year term of office should also be envisaged for the International Criminal Court, rather than the proposed 12 years, which was too long.

41. His delegation appreciated the efforts of the Commission and its Working Group to minimize the budgetary impact of a permanent court by providing that the tribunal should be operational only as needed.

42. On the question of the court's jurisdiction, he said that since the prospects for final adoption of the Code of Crimes against the Peace and Security of Mankind were rather remote, the approach chosen by the Working Group in referring to certain international conventions in force was fully comprehensible. Nevertheless, his delegation considered that the list of those conventions in article 22 was perhaps too long. A distinction should be made between crimes under international law which entailed individual criminal responsibility and offences - sometimes very serious ones - which were the subject of international cooperation among States, in regard to their prevention and punishment. Only the first category should enter into the jurisdiction of the international criminal court. His delegation supported the inclusion of the conventions and other agreements mentioned in article 22, paragraphs (a), (b) and (e), while having some doubts regarding the other conventions listed in article 22. In connection with crimes under international law, he noted that the Working Group sometimes referred to them in the commentaries to several articles as international crimes, a term which should be reserved for unlawful acts of States as qualified in article 19 of the Commission's draft articles on state responsibility. Of the three alternatives included in article 23 concerning the acceptance by States of jurisdiction of the court, his delegation definitely preferred alternative B, the so-called "opting out" system. For States parties, recognition of the court's jurisdiction over crimes covered by

(Mr. Hlavacek, Slovakia)

the conventions relating to crimes under international law should become the norm and not the exception.

43. Turning to the question of applicable law, he said that while the statute of the international criminal court, as well as applicable treaties were generally acceptable, the reference in article 28 to rules and principles of general international law and to rules of national law as a subsidiary source was much more complicated. Further clarification was needed. His delegation understood the concern of those who, invoking the principle of nullum crimen sine lege, recommended against the inclusion of rules and principles of general international law among the sources of applicable law. It was his delegation's view, however, that general international law should also play a role in the work of the court, especially in situations where international conventions to which the great majority of States were parties were not directly applicable. As the International Court of Justice had confirmed in several judgments, customary international law continued to exist and to apply, separately from international treaty law, even where the two categories of law had an identical content. The role of national law, referred to in article 28 (c) was a limited one, and should be understood particularly in connection with article 53, which dealt with applicable penalties.

44. Mr. THIAM (Guinea) said while the international criminal tribunal should be a permanent institution, it should only be convened when circumstances called for it. That would ensure the independence, objectivity and impartiality of the judges, and also the deterrent effect of the tribunal.

45. His delegation believed that the tribunal should be established by multilateral convention as a United Nations organ. That would not adversely affect the independence of the institution; if it was accepted that the United Nations represented the common will of the international community, then that independence would naturally extend to United Nations bodies.

46. The tribunal's judges should be elected by the General Assembly according to equitable geographical distribution. His delegation had no objection to calling the jurisdictional mechanism a tribunal according to the Nuremberg precedent of a body composed of a court registry and procuracy.

47. The tribunal should apply international conventions and agreements on crime. However, his delegation also supported the idea of extending the law applicable by the tribunal to include the general principles of international law, otherwise crimes as serious as aggression might become exempt from the principle of the inevitability of punishment. Concerning acceptance of the jurisdiction of the tribunal, his delegation preferred alternative B of draft article 23.

48. His delegation had no major difficulty with the organization of the procuracy as proposed in the draft statute, but was concerned that giving the prosecutor the right to open an investigation on his or her own initiative might pose some problems with regard to the principle of the independence of the investigative branch in relation to the prosecution and trial branches. With regard to jurisdiction ratione personae, his delegation endorsed the

(Mr. Thiam, Guinea)

Commission's decision that the jurisdiction of the court would apply solely to individuals.

49. The prevailing opinion against judgement by default appeared merely to ensure the impunity of a criminal who might take refuge in a State which was not a party to the statute of the court. Judgement by default would ensure the inevitability of punishment and would also guarantee a fair trial, since the accused could make an application to vacate judgement. By establishing an international criminal tribunal, the international community was pursuing noble goals, and there was no room for ineffectiveness.

50. So as to apply the second-hearing principle, which was a fundamental human right and an essential guarantee for a fair trial, the tribunal should be made up of chambers. They would be the jurisdiction of first instance, and the tribunal would be the jurisdiction of appeal. It should also be noted that the tribunal's decisions would have no impact if it did not pronounce upon the reparation of the injurious consequences of the crimes.

51. It was with great concern that his delegation had heard the scepticism of delegations which had put forward political reasons as a major obstacle to the establishment of the tribunal. Flexibility and consensus should be the key words in overcoming those difficulties. The absence of an international criminal code had been given as the reason why the tribunal should not be established, but that argument meant that acts defined as crimes in conventions and the general principles of customary law would go unpunished. Furthermore, when the draft Code of Crimes against the Peace and Security of Mankind had been drawn up, the absence of a criminal jurisdiction had been given as a major impediment to its adoption. Now that the details of such a tribunal had been worked out, the objection was raised that the draft Code had not been adopted. It was to be hoped that the vicious circle would be broken and that the excellent work of the Commission would be completed as soon as possible.

52. Mr. Al-Suwaidi (United Arab Emirates), Vice-Chairman, took the Chair.

53. Mr. NEUHAUS (Australia) said that the essence of the draft statute for an international criminal court developed the proposal for such a tribunal in the right direction. His delegation agreed that a court should be established as a permanent institution open to States parties to its statute, but sitting only when required to consider a case submitted to it. It would thus remain cost-effective and efficient whilst ensuring the highest standards of international justice.

54. His delegation also strongly believed that it was important for the tribunal to be an institution of the United Nations, since that would enhance its authority and credibility and also enable it to relate effectively to the Security Council. Such a linkage would not require an amendment to the Charter of the United Nations. Article 92 of the Charter described the International Court of Justice as the principal judicial organ of the United Nations, the qualifying word "principal" indicating that other judicial organs were not necessarily precluded. The court could therefore be established under Article 7, paragraph 2, of the Charter as a subsidiary organ. However, if that approach was rejected, it would be sufficient for the tribunal to be linked with

(Mr. Neuhaus, Australia)

the United Nations in the same way as, for example, the International Atomic Energy Agency. His delegation would be interested to see further discussion and a resolution of the issue in the Working Group on a draft statute for an international criminal court.

55. Articles 19 and 20 of the draft statute provided that the rules of the tribunal should be determined by the judges acting in accordance with the principles of the statute. It was a provision akin to article 15 of the Statute of the International Tribunal established in the case of the former Yugoslavia. However, since Security Council resolution 827 (1993) provided for States to submit comments on the rules of procedure and evidence to the judges of the International Tribunal, his delegation believed that it would also be appropriate to consider whether a similar mechanism could be created for the international criminal tribunal. That did not mean that the States themselves should draft the rules of procedure, as that could only complicate the life of the court and delay adoption of its Statute.

56. Article 22 of the draft statute contained a useful list of crimes over which the court might have jurisdiction, and covered the main areas on which there could be general international agreement. That list should not be exhaustive, however. States parties to the statute should be able to agree at a subsequent stage on additional crimes, and possibly those defined by conventions which had not yet been drafted.

57. Of the three alternative versions of article 23, his delegation preferred alternative A for two reasons. Firstly, in practice it would be more desirable to encourage the greatest number of States not only to sign, but also to ratify the statute. That objective would be best achieved by alternative A, which would allow States to choose those matters on which they were prepared to accept jurisdiction. Secondly, paragraph 4 of alternative A encouraged greater participation by permitting States which were not parties to the statute to accept the jurisdiction of the court over crimes on an ad hoc basis. That would promote the use of the court even by those countries which were reluctant, in the first instance, to become parties to the statute. Alternative B did not allow for that possibility.

58. Article 26 was also significant since it permitted States to confer jurisdiction in certain circumstances on the court in respect of crimes not listed in article 22. Although the category of crimes under general international law might be considered to be somewhat imprecise, it should be noted that such crimes could only be tried where they were recognized by the international community as possessing a fundamental character. His delegation supported that provision as a means of ensuring that the tribunal could have jurisdiction over crimes which had not yet been created in a treaty, but which had been universally condemned in the international community. To omit such crimes would give rise to an unfortunate lacuna in the draft statute.

59. Part 4 of the draft statute contained some important rules of procedure, such as that of legality or nullum crimen sine lege (article 41), which was consistent with article 15 of the International Covenant on Civil and Political Rights. The words contained in square brackets in article 41 (a) should be retained in the final text, as they made it clear that a given treaty provision

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must have been made applicable to the accused by whatever mechanism different States might adopt. His delegation also welcomed the guarantee of the fundamental presumption of innocence in article 43. The issue of trials in absentia, provided for in article 44 (1) (h), had created controversy within the Working Group. In principle, Australia would be opposed to trials in absentia, particularly since article 14 (3) (d) of the International Covenant on Civil and Political Rights provided that an accused person was entitled to be tried in his or her presence. If trials in absentia were allowed, the details of that provision would need to be addressed, to determine what for example should be done in a situation where an accused person was held in custody but refused to participate in proceedings. If trials were to be held in absentia, significant procedural safeguards were needed and those details should be further considered by the International Law Commission.

60. Although draft article 45 addressed the important issue of double jeopardy in accordance with article 14 (7) of the International Covenant on Civil and Political Rights, his delegation was concerned that paragraph 2 (a) of the draft article would allow the court to try a person who had been convicted by another court where the act in question was characterized as an ordinary crime. The issue therefore arose as to whether the principle of non bis in idem was genuinely being adhered to. His delegation hoped that the Commission would reconsider the matter.

61. Australia supported the right of appeal as set out in draft article 55, which was also in accordance with the relevant article of the International Covenant. However the question of whether the prosecutor would have a right of appeal was in square brackets. His delegation would support the prosecutor's right to appeal against decisions of the court, and requested that provision should be made to that end to ensure that the acquittal of an accused person was not legally flawed or based on an error of fact. As to the appeals chamber itself, his delegation considered that a separate appeals chamber might be preferable, but that would no doubt be determined by the number of judges constituting the court and the expected case-load. At the very least, however, the judges hearing the appeal should be different from those who had heard the case at first instance.

62. Draft article 63 might be seen as cutting across generally accepted rules of extradition law. For example, States retained the discretion not to extradite an accused person. However, with regard to the tribunal, it might be argued that by specifically consenting to jurisdiction, States had already agreed to the tribunal hearing the case and had therefore relinquished the right not to hand over the accused person.

63. With regard to the enforcement of sentences, his delegation agreed that States should not have the duty of imprisonment inflicted on them, but rather should be able to offer facilities for imprisonment where possible. In some federal systems, the federal Government itself might not have the prison facilities to offer. No doubt arrangements could be made even in those circumstances, but it was important to be flexible. States should certainly be urged to be prepared to provide prison facilities.

64. Mr. HAYES (Ireland) said that during the preceding year the Security Council had established an ad hoc international criminal tribunal to deal with the dreadful activities that had been taking place in the former Yugoslavia. However, although that had been the only timely and effective method available to deal with the situation in the former Yugoslavia, it had strengthened the conviction of his Government that an international criminal tribunal should be established by an international convention which would also establish the tribunal's jurisdiction and identify the law applicable by it.

65. His delegation supported the view that the tribunal should be a permanent institution and that the court would convene only when it was called upon to deal with cases submitted to it. In that respect, it found draft article 4 satisfactory.

66. Draft article 2 revealed an understandable indecision as to the relationship between the tribunal and the United Nations. For practical reasons, his delegation believed that it would be extremely difficult to amend the Charter of the United Nations to make the tribunal an organ of the United Nations. It would be uneasy about adopting any procedure whose efficacy or validity would be subject to the slightest doubt and which might leave the competence of the tribunal open to challenge. Accordingly it would prefer a separate tribunal having a close cooperative relationship with the United Nations under appropriate rules. Therefore, it favoured the second bracketed version of draft article 2.

67. The approach described in draft articles 5, 7, 12 and 13, under which the term "tribunal" encompassed the court, the registry and the procuracy, and provision was made for the election of the judges, the registrar, the prosecutor, and the deputy prosecutor, was a sensible one. The draft articles, including article 17, correctly recognized that those offices were not necessarily exclusive of other activities by the persons elected, provided that such activities were in no way inconsistent with their responsibilities to the tribunal. Furthermore, since the tribunal would not have heavy duties on a permanent basis, its cost should be correspondingly modest.

68. Articles 22 and 26, respectively, drew a useful distinction between the two categories of crime, which formed an adequate basis for a corresponding distinction in the rules on conferring jurisdiction on the tribunal in respect of each category. While at first sight the listings seemed satisfactory, further consideration was required before their finalization. He welcomed the procedure proposed in article 21 (b) for addition to the list contained in article 22.

69. With regard to the modalities for acceptance of jurisdiction, he regretted that States were still not prepared to see acceptance of jurisdiction for the crimes listed in article 22 as implicit in the ratification of the statute. Among the alternatives in draft article 23, he preferred alternative B, which rendered more likely the establishment of an effective jurisdiction within a reasonable time.

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70. He remained unconvinced of the need for draft article 25, which would give the tribunal jurisdiction over cases submitted to it by the Security Council, since that might introduce an excessively political element. The establishment of a permanent tribunal should, ipso facto, make ad hoc tribunals unnecessary. Furthermore, if the designation of States parties enabled to bring a complaint was as wide as provided for in draft article 29, then it was unlikely that the Security Council would need either to set up an ad hoc tribunal or to act under draft article 22. Moreover, the wording of articles 22 and 29 did not confine the Security Council to referring a situation rather than an individual case to the tribunal.

71. There was no entirely satisfactory solution to the problem of the respective jurisdictions of the Security Council exercising an essentially political function, and an international tribunal associated with the United Nations exercising a judicial function. Under draft article 27, it might not be possible to bring an accused person to trial in cases where the alleged criminal action was related to aggression and the situation had not been considered by the Security Council. If there was a way of closing that loophole, it would obviously be an improvement.

72. Parts 3, 4 and 5 of the draft statute, which covered investigation and commencement of prosecution, the trial, and appeal and review, respectively, were rightly detailed. They provided the necessary procedures for pursuance of a case all the way from the complaint to the final verdict. Together with the provisions of parts 6 and 7, they were necessary to make the system work. Although at first sight they seemed to be concerned more with mechanics than with legal principles, their provisions also put in place the practical means through which the rights of the accused to a fair trial might be respected. While the provisions of draft articles 30, 33, 38 to 46 and 64 were the most important in that respect, other provisions were also relevant. His delegation would require more time to study them in greater detail.

73. He hoped that the Commission was set on a practical course which would culminate, in the reasonably near future, in the establishment of an international criminal tribunal before which persons accused of defined international crimes might be brought to trial, thereby saving the international community from the frustration of seeing appalling crimes going unpunished because of the lack of jurisdiction to enable the trial of those accused of such crimes. The Commission was not engaged in an exercise in lofty legal theory, but rather in a task which should produce a judicial system that was both effective and just. The Commission's response to its mandate to draw up a draft statute for an international criminal court had exceeded reasonable expectations, although much work remained to be done on the draft statute, which had not been considered by the Commission as a whole. His delegation supported the Commission's proposal that the draft articles should be transmitted to Governments for their comments, and was pleased that it expected to complete its work on the elaboration of the draft statute at its following session.

74. Mr. STANCZYK (Poland) said that a new mechanism was needed to strengthen the rule of law within the international community. His delegation therefore welcomed the decision of the Security Council, adopted pursuant to Chapter VII of the Charter, to establish an International Tribunal in the case of the former Yugoslavia (resolution 827 (1993)). An international criminal court which was available to States on a permanent basis was, however, still necessary, and the Commission's work on the draft statute had shown that such a court was feasible.

75. In the view of his delegation, the statute of the court should take the form of an international convention. Any other solution, in particular that adopted with respect to the International Tribunal concerning the former Yugoslavia, would not be satisfactory. In the case of a permanent court, there could be no derogation from the principle of the consensual basis of its jurisdiction and establishment. Consequently, a contractual basis for the court would prevent any future questioning of its jurisdiction by reference to real or apparent inadequacies of its establishment.

76. The amendment to the Charter which would be required if the court were to become one of the principal organs of the United Nations might be a lengthy and cumbersome process, unless an overwhelming majority of States were in favour of structuring the position of the court within the United Nations. Since such a majority might be difficult to muster, it would be better to establish some formal linkage between the court and the main organs of the United Nations. References to such a linkage were already present in the draft statute, and article 2 should contain an adequate formula for generalizing those specific links.

77. The judges elected to the court should represent the principal legal cultures of the world and reflect the membership of the United Nations. The various defendants might be nationals of a variety of States, and the legal culture in which they had been brought up could not remain unknown to all the judges of the court. Furthermore, if the bench was regarded as not representative, that might be viewed in specific cases as detracting from the value of the court's decisions.

78. His delegation shared the view that the provisions of the draft statute governing the court's jurisdiction, its acceptance by States, and conditions for a complaint to be brought before the court needed further elaboration.

79. Some of the arguments advanced in favour of dividing the subject-matter jurisdiction of the court into a regular one and one resulting from an extra effort on the part of States were not compelling. In certain conditions, and especially since a majority of States would opt for alternative A indicated in article 23, acceptance by a State of both strands of the court's jurisdiction might require a positive declaration on the part of that State. Under those conditions, therefore, both strands indicated in articles 22 and 26 were optional and required specific consent. It was not clear, however, why the limitation ratione personae had been maintained in article 26, paragraph 1, and excluded from article 24. One possible explanation was that the special consent contemplated in article 26 was not meant to be made in general terms pro futuro, but only in relation to a specific crime committed by specified persons. That meant that the nature of special consent came half-way between the consent allowed under article 24 and the complaint under article 29. Similarly, the

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mention of "categories of persons" in article 26, paragraph 1, also needed clarification.

80. Under that reading of article 26, the two strands of jurisdiction were somewhat different from each other. It was therefore advisable to reformulate that provision in order to provide in clear terms for the possibility for States to confer upon the court, in abstract and general terms, additional scope for subject-matter jurisdiction. Only then would the international community be able to establish an international criminal court endowed with the power to try crimes, such as aggression, which had not yet been defined by treaty, and genocide, in the case of States not parties to the Convention on the Prevention and Punishment of the Crime of Genocide. Poland fully agreed with the conclusion of the Working Group contained in paragraph (2) of the commentary to article 26 that, at the current stage of development of international law, a court without jurisdiction on a permanent basis over such crimes was inconceivable.

81. The differentiation between the two strands of the court's jurisdiction would be more justified if a clear preference for alternative B contained in article 23 was voiced in the Committee. It seemed natural that States should agree that, at least presumptively and in the absence of a declaration to the contrary, their consent to be bound by the statute of the court would entail acceptance of its jurisdiction. If that solution, which Poland supported, was adopted, the current split of the methods of accepting the court's jurisdiction would retain some merit.

82. It had been rightly suggested that the problem of consent to the court's jurisdiction should be referred to a provision which would lay down conditions to be fulfilled before a complaint could be brought before the court. The provisions of article 24, paragraph 2, and of article 26, paragraph 3, might therefore be included in article 29. The same was true for article 25, which did not of itself broaden the court's jurisdiction, but provided only for the Security Council's right to refer cases, or a class of potential cases, by indicating a situation of aggression. Admittedly, the exercise by the Security Council of the right to refer cases was comparable and parallel to the exercise of the right of a State to lodge a complaint.

83. The statute of an international criminal court must provide adequate guarantees for ensuring that international standards concerning due process and human rights were respected. While the current wording of articles 40 to 46 did much to address that concern, the drafters of the statute must never lose sight of the issue of the protection of the rights of the accused.

84. Turning to two specific problems, he observed that international law considered the possibility of appealing against judgement or sentence to be an inalienable right of an accused person. However, not all the issues relating to the right of appeal had been adequately dealt with by the Working Group. His delegation was in favour of distinguishing between the right of the defence and the right of the prosecution to appeal against a decision of the court. The latter right might have a more limited scope. For its part, the issue of trials in absentia was still unresolved and, in that connection, there should be no derogation from the relevant provisions of international human rights

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instruments. In addition, the authority and effectiveness of the court and the demoralizing effects of unenforced sentences should be borne in mind. The Commission should carefully weigh those and other considerations when approaching the problem.

85. Mrs. VALDES (Cuba), recalling that the idea of establishing an international criminal jurisdiction had arisen in connection with the efforts to draft the Code of Crimes against the Peace and Security of Mankind, said that her delegation had had serious doubts regarding the need for a tribunal. In a spirit of cooperation, however, it had not stood in the way of the proposal being included in the agenda of the International Law Commission. Unfortunately, work on the drafting of the Code had been delayed over and over again, and yet the idea was now being put forward that the draft statute for the international criminal tribunal could be adopted immediately, and that its acceptance had nothing to do with the adoption of the draft Code. Her delegation fully agreed with those delegations that had expressed doubts regarding the establishment of the tribunal. A careful analysis of the draft statute showed that there were a number of technical, economic and even political difficulties that had to be resolved before an international criminal tribunal could be set up. Moreover, such a body could be truly effective only if it was supported by a broad consensus of States Members of the United Nations, and that agreement did not appear to exist.

86. In addition to the controversial aspects of the draft statute, there were others that required further clarification, including the relationship between national laws and international law, and the approach to extradition. The status of the tribunal with respect to the United Nations must also be clarified in the light of the potential legal implications for the Organization.

87. A tribunal as important as the one proposed must be based on the principle of voluntary acceptance by States of its jurisdiction. Although that principle appeared to be guaranteed in the text of the articles at the beginning of the draft, it was contradicted by article 25, which authorized the Security Council to refer certain cases to the tribunal. Her delegation wondered what legal basis there was for conferring on the Council the powers of a prosecutor. That provision was in line with the recent trend of the Council to go beyond the mandate entrusted to it under the Charter. Moreover, although the Council held the primary responsibility for the maintenance of peace, it was not the only body in the United Nations system which held that responsibility, nor did all the acts covered by the draft statute relate to the maintenance of peace. It would be counter-productive to concentrate so much power in the Council, especially in view of the fact that it was one of the bodies that was least representative of the overall membership of the United Nations.

88. It should also be borne in mind that the proposed international criminal tribunal would be judging individuals and not States. It was therefore hard to understand what role the Security Council might play in such cases. The Council was empowered under the Charter to consider and decide on questions having to do with the behaviour of States as such, but not with the acts of individuals, particularly when the problems being dealt with did not affect international peace and security. It should also be noted that while some of the actions mentioned in article 22 and in article 26 (2) were certainly reprehensible, they

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were not listed as offences in any legal instrument; thus, there was a potential contradiction with the long-standing principle of criminal law of nullum crimen sine lege.

89. In conclusion, she stressed that further study would be necessary in order to ensure that the proposed international criminal jurisdiction did not violate the principle of sovereignty, and that it would be acceptable to the international community as a whole.

90. Mr. WALDEN (Israel) said that the concept of an international criminal court had arisen in the aftermath of the Second World War. At that time, the intention had been to establish a permanent tribunal, analogous to the Nuremberg Tribunal, to try crimes against humanity. A similar concept was at the origin of the International Tribunal established in connection with the former Yugoslavia and was a major element of the jurisdiction conferred on that body. However, the draft articles before the Committee included an additional concept, that of jurisdiction over major transnational crimes, especially drug trafficking. While an international tribunal might well be a valuable tool in the battle against drug-related crimes, it was unclear whether the same court could serve both purposes, and whether jurisdictional and procedural rules, including rules of evidence, appropriate for one purpose could be appropriate for the other. Articles 22 and 26, as currently drafted, reflected the recognition that different approaches might be needed. Those articles distinguished among three categories of crimes and established different jurisdictional rules for the first category, on the one hand, and the second and third categories, on the other hand. However, the distinctions between the categories had been drawn in a way that many delegations found unconvincing. His delegation believed that if the tribunal was to have a dual function, the two categories of offences should be defined in a more satisfactory way, and the rules and procedures to be adopted with regard to each of them should be worked out separately.

91. Another issue which required further clarification was the level of crime over which the tribunal should have jurisdiction. Clearly, the court should not deal with petty offences. It should be activated only in cases of such gravity as to require the involvement of the international community as a whole. Accordingly, either clear criteria must be established for distinguishing major offences from minor ones, or the tribunal should be empowered to make that distinction in individual cases.

92. Within the first category of crimes over which the tribunal was to have jurisdiction, article 22 listed some defined by specific treaties, while article 26, paragraph 1 (a), referred more generally to "a crime under general international law". That definition appeared to be too vague to serve as a satisfactory basis for jurisdiction ratione materiae. Prosecutions under that heading would be in danger of violating the principle of nullum crimen sine lege.

93. As it was essential for the tribunal to be totally independent, his delegation believed that it should not be an organ of the United Nations. Any impression, however mistaken, that the tribunal was subject to political influence in the exercise of its functions could undermine confidence that

(Mr. Walden, Israel)

persons under its jurisdiction would receive a fair and impartial trial. It was also questionable whether a new judicial organ could be established on a permanent basis without an amendment to the Charter of the United Nations. That did not, of course, rule out the possibility of establishing a link between the tribunal and the United Nations through a cooperation agreement, as had been done for many other organizations.

94. While the total independence of the procuracy from the court was, to a large extent, ensured by the draft articles, article 15, paragraph 2, which empowered the court, under certain circumstances, to remove the prosecutor or the deputy prosecutor from office, appeared to violate that principle. It might be worth reconsidering the formulation by which both the prosecutorial organ and the court were treated as constituting a single entity, namely, the "Tribunal", and establishing two separate and independent bodies.

95. With regard to acceptance of the court's jurisdiction, three alternatives were set out in article 23. Under the first and third alternatives, acceptance of jurisdiction involved an express declaration by a State, separate from the act by which it became a party to the court's statute. Under the second alternative, a State, by becoming a party to the statute, automatically accepted jurisdiction, unless it declared otherwise. His delegation believed that the first approach was preferable, as it would encourage acceptance of the statue by States which might otherwise be wary of conferring broad jurisdiction on an untried institution.

96. Mr. BERMAN (United Kingdom) said that the issue of the relationship between an international criminal court and the United Nations, while of great importance, was far from simple. His delegation assumed that a permanent court of general jurisdiction would have to be established by means of a treaty. However, it was unclear how an institution owing its existence to a self-standing treaty, even one concluded under United Nations auspices, could be brought into organic relationship with the Organization. Furthermore, it was difficult to see how a permanent court could have the status or the authority it required unless it operated under the United Nations banner. While such a court could not be a subordinate organ, neither could it be given the same standing as a principal organ without an amendment to the Charter. A cooperation agreement with the Economic and Social Council under Article 63 of the Charter did not appear to be a solution, as it was unclear who would contract for the court and what degree of participation in its founding treaty would be required in order to justify the United Nations label.

97. The question of jurisdiction ratione materiae was at the core of the concept of a permanent court. His delegation endorsed the statements made on that subject by the representatives of Brazil and Norway. It was essential for crimes to be defined with the necessary precision so that the court could never be accused of fashioning the law to fit the case. Clearly, there were major differences not just between the crimes described in article 22 and in article 26, but between those described in article 22 itself. The addition of so-called crimes "under general international law", which were not defined by any treaty, was patently unsatisfactory. The Commission would need to isolate those crimes which were universally recognized as being suitable for international jurisdiction. His delegation doubted that the draft Code of

(Mr. Berman, United Kingdom)

Crimes against the Peace and Security of Mankind would fill the gaps in the substantive law, and referred to the comments made in that connection by the representative of France.

98. With regard to jurisdiction ratione personae, his delegation agreed with the statement made by the United States representative. Since the court's jurisdiction would be based on consent, the question arose as to which States would have to consent in order for a particular prosecution to be admissible before an international court. His delegation believed that the threshold of consent was set too low in the current draft and that, in view of the provisions of articles 33, 62 and 63, concerning the relationship between the court and States which had not accepted its jurisdiction or which were not parties to its statute, there was a risk of exceeding the bounds of jurisdiction by consent.

99. A closely related issue was the relationship between international and national jurisdiction. While the primacy clause in the Statute of the International Tribunal in connection with the former Yugoslavia was understandable under the circumstances, the position with regard to a permanent court of general jurisdiction was far from clear. What was important was that crimes should be duly prosecuted and punished, not by whom.

100. As to the role of the Security Council, the proposals contained in articles 25 and 27 were quite different in nature. Article 27 sought to bar prosecutions unless there had been a determination by the Security Council, presumably under Article 39 of the Charter. While that could be explained by the nature of the offences involved, the article, as drafted, failed to deal with either the problems of legal principle or the political repercussions of prosecuting offences involving "aggression". As to article 25, his delegation failed to understand why it should be included. It was not only a duplication of article 29, but also a serious breach of the principle of jurisdiction by consent. If it was intended to raise the possibility of the Security Council referring cases involving individuals to the court, it was seriously objectionable on that ground alone. It was unclear to what extent prosecutorial independence could be maintained if the Council could exercise its power under the Charter to refer cases to the court.

101. Lastly, his delegation shared the view that the court's statute should cover the basic elements of the rules of evidence.

102. Mr. NICK (Croatia) said that while the Committee was meeting, international human rights standards and humanitarian law were being massively and systematically violated in several parts of the world, including the former Yugoslavia. His country would be greatly relieved if those norms could be reinforced by an efficient system of law enforcement, making them into jus cogens, not just a set of recommended rules. If the future repetition of current atrocities was to be avoided, they must not go unpunished. His Government believed that not only the actual perpetrators, but also those who ordered, tolerated or profited from such crimes should be held responsible. In the case of the former Yugoslavia, that meant those responsible for the systematic incitement of national, ethnic or religious hatred. While they were easily identified, it would be difficult to bring them to justice. His delegation was not certain that article 22 and the other draft articles, as

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currently formulated, were sufficient in that regard. The greatest difficulties could be expected from those countries and regimes which should be called to account in the first place, as they would be the least likely to accede to any legally binding international instrument, and the first to attempt to sabotage it through false proceedings within the meaning of article 45, paragraph 2 (b).

103. Mr. CASTILLO (Nicaragua) said that, in the view of his delegation, an international criminal court should be a permanent organ which could respond rapidly to situations as they arose. Moreover, consideration should be given to the court's funding, and to ensuring that it would have sufficient capacity to perform its functions.

104. The most appropriate method of establishing a permanent international criminal court would be through a multilateral convention concluded under the auspices of the United Nations, leaving it to the discretion of States to accept the court's statute and jurisdiction. As to the relationship between the court and the United Nations, his delegation believed that the Commission should continue to explore the alternatives before it.

105. The court's jurisdiction ratione personae could be limited to individuals. His delegation shared the general view in the Commission in that regard. With regard to jurisdiction ratione materiae, his delegation believed that the principle of nullem crimen sine lege called for clarity and precision in the definition of crimes under general international law. Work on the draft Code of Crimes against the Peace and Security of Mankind should continue and, until it was finalized, steps should be taken to enable the court to try specific crimes of an international character.

106. Mr. PEREZ OTERMIN (Uruguay) said that Uruguay shared the widely held view that the early establishment of an international criminal court was necessary, given the many recent occurrences that were offensive to the dignity of mankind. He agreed with the Special Rapporteur that the Commission's draft should be viewed not as a report which proposed definitive solutions to a complex problem, but rather as a plan of work and an introduction to the different chapters of the draft statute of the court.

107. In view of its overriding importance, the international criminal court should be an organ of the United Nations established by treaty. Though a permanent body, the court should function only where special circumstances arose, given the prevailing economic conditions.

108. While his delegation believed that the court should apply the norms of public international law, as derived from international agreements, it had no objections to the application of general principles of secondary law, customary international law, and even the case-law of the court itself and of other courts with similar jurisdiction, such as the Nuremberg Tribunal and the recently established International Tribunal concerning the former Yugoslavia. His delegation also believed that the decisions of the court should be subject to appeal to a higher instance.

(Mr. Perez Otermin, Uruguay)

109. The main aspect of the draft statute was the determination of the court's jurisdiction, both ratione personae and ratione materiae. With regard to its jurisdiction ratione personae, while it seemed possible that the court would only try accused persons, his delegation was confused by the inclusion of the crime of aggression, which must be committed by a State, in accordance with the provisions of the draft Code of Crimes against the Peace and Security of Mankind. It disagreed with the provision made in article 27 of the draft statute for intervention by the Security Council, inasmuch as the Council was in a position to act within the existing structure, using its power of veto.

110. With respect to jurisdiction ratione materiae, the general criterion in the determination of crimes to be brought before a court such as the international criminal court should be the classification as international crimes of those crimes whose seriousness transcended the limited sphere of a State and which affected mankind as a whole. The decision as to whether to try such crimes before an international court could not be left to a State; referral to an international jurisdiction should be compulsory. Work should therefore continue to focus on the codification of international crimes, which were yet to be adequately defined, in order to give full effect to the principle of nullem crimen sine lege. The codification of international crimes must cover applicable penalties in order to safeguard the other fundamental principle: nulla poena sine lege. In that connection, his delegation believed that the death penalty must be excluded from the range of possible penalties. The draft statute covered a number of acts, such as genocide, which clearly met the criteria established for international crimes. Others, however, though very serious in nature, should not be classified as crimes coming within the purview of the proposed court.

111. More work was required on certain other elements of the draft statute, such as the independent investigation stage, which, though a reasonable proposal, would increase the cost of the court's operation. His delegation accepted the need for a prosecutor and agreed with the procedures proposed for his appointment. Such a prosecutor should act as the representative of the international community as a whole in keeping with the idea that, in the prosecution of an international crime, one State was not taking action against another. Rather, it was the international community that was taking action against the alleged offender.

The meeting rose at 6.10 p.m.